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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1279

AUTOMATIC RADIO MFG. CO., INC., and
AUTOMATIC RADIO SALES, INC., *Petitioners*

v.

FORD MOTOR CO., *Respondent*

PETITIONERS' REPLY BRIEF

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Boston, Mass.

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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Consistently with the limitations proper to certiorari proceedings, petitioners will rely upon the statement of the case, the arguments and the authorities set forth in their petition, which in their view are accurate, fair and valid. Accordingly they will confine their reply to two significant points:

1. Ford relies exclusively on *Foundry Services* v. *Beneflux Corp.*, 206 F.2d 214 (2d Cir. 1953), to support

its contention that a showing of loss of sales* is not sufficient to establish irreparable injury for which a plaintiff cannot be adequately compensated unless a preliminary injunction is granted (Respondent's Brief, p. 7). *Foundry Services* is a Second Circuit holding by a split panel in a diversity case (Learned Hand, J., dissenting on the point here in issue), apparently declaring a New York State rule governing injunctions, and moreover a State rule which another Second Circuit panel declined to follow a few months later. See *Franke* v. *Wiltschek,* 209 F.2d 493 (2d Cir. 1953), particularly page 507, footnote 22, in the dissenting opinion of Judge Frank, where, in discussing *Foundry Services,* he said:

> That case was brought in the federal court in New York, with jurisdiction based on diversity of citizenship. The court did not discuss any New York authorities. If my colleagues' opinion in the instant case is correct, then, if it were the rule in New York that a temporary injunction would always issue in such a case, the decision

* It cannot be seriously disputed that petitioners' sales have been greatly reduced by Ford's dashboard tie-in practices. During the six-months period ending March 31, 1967, petitioners' sales of custom radios for Ford cars had declined by 80 percent from the level obtaining in 1962 before the tie-in practices began. In contrast, during the same period sales of petitioners' custom radios for General Motors and Chrysler cars, wherein only limited dashboard tie-in problems were encountered, were reduced only 36 percent and 27 percent respectively below their 1962 levels. See Affidavit of Sidney M. Lerner, Robert R. Nathan Associates (Appellants' RA 126-134) as corrected in open court by Mr. Lerner at page 8 of the June 26, 1967 hearing transcript (Plaintiffs' Xeroxed Record Appendix). Moreover, Ford's argument either ignores or treats as mere loss of sales petitioners' uncontroverted showing that they have been completely excluded from the Mercury and Comet radios markets by Ford's tied selling practices (Appellants' RA 64, 70, 135).

in the Foundry Services case would have been wrong.

Reliance by Ford on such weak and ambiguous authority strongly endorses the need for this Court to declare the standards which should govern interlocutory relief in private antitrust litigation. At the least it evidences the lack of any broad authoritative holding on this important matter.

2. Ford argues that the Court should deny this petition because the case is at an interlocutory stage. This argument, if it were valid, would preclude the Court from ever passing upon the important question here presented, viz., what standards govern interlocutory relief in private antitrust litigation under Section 16 of the Clayton Act (15 U.S.C. § 26). The short answer to the argument is that the Court should grant the petition if, and because, it presents a question of federal law of general importance and broad applicability upon which this Court has not ruled and upon which courts of appeals have divided.

Respectfully submitted,

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